was common to both sides that a son of Yong Nyee Fan, one Yong Su Hian by name, took his place on the Board of Kim Guan & Co. after his death and that shortly afterwards, Yong Su Hian issued a notice to Kim Guan & Co. to quit the premises.

On receipt of this notice, Yap said he instructed his then solicitors, Das & Co., to write to Yong & Co. claiming that the property was trust property. The office copy of this letter which would ordinarily be retained by the solicitors is now untraceable as Das & Co. was closed shortly afterwards by the unfortunate death of one of the partners of the firm, but Yong & Co. adduced evidence, for what it was worth, that their solicitors did not receive any such letter.

But on receiving representations from Yap and possibly Tan as well, Yong Su Hian retracted the notice to quit, and instead demanded an increase of rent to $700 p.m. The increase in rent was not paid, and no action taken to enforce it, probably because it was illegal, but at the same time Yap admitted that neither did he take any action, even at that stage, to enforce the alleged trust. It was, according to him, not in the nature of the Chinese to resort to action.

However something came out of all this. The relationship between the parties had by then become strained and it was thought that the time had come for the parting of the ways. On October 23, 1961 a settlement (the 1961 settlement) was reached whereby Yong Su Hian and members of his family transferred their shares in Kim Guan & Co. to Yap and Tan and in turn Yap and Tan and members of their families transferred their shares in the Yong Nyee Fan Mining Co. Ltd. to Yong Su Hian and his relations. There was also a cash adjustment arising from the valuation of the respective shares. Yap and Tan paid Yong Su Hian $22,000 as well as his legal fees. Yap and Tan said however that the 1961 settlement contained an acknowledgment of their right (of which there was no written evidence) to house No. 26, but Yong Su Hian said that the settlement did not extend beyond the exchange of shares.

Despite what Yap and Tan contended, Yong Su Hian in 1967 asked for fair rent and at a Board meeting, offered to transfer the house to Kim Guan & Co. for $70,000. No record exists of the reactions of Yap and Tan to this offer.

Then on May 29, 1970, Yong Su Hian served on Kim Guan & Co. a year's notice to quit, preparatory to an application to the Rent Tribunal for re-possession of the premises for rebuilding and in 1973 Yong Su Hian applied for re-possession. This was the traditional last straw. Kim Guan & Co. consulted solicitors and their solicitors on April 10, 1973 formulated a claim based on the alleged trust. And it is to be remarked that in all the voluminous documents possessed by the respondents, this was the very first in which a claim of this nature was made. Three days later, apparently without waiting for a reply, Kim Guan & Co. took the action which hitherto Yap had, as he said, been so loath to take, as being not in his character.

This action so long-delayed laid Kim Guan & Co. wide open to a charge of laches which the appellants dutifully made both at the court of first instance and before us.

Now it is abundantly clear that all this evidence post-mortem Yong Nyee Fan which the learned judge considered is of no probative value whatsoever in deciding the central issue whether or not Yong Nyee Fan was the trustee of house No. 26 for Kim Guan & Co. Ltd. It was not in any way evidence of what Yong Nyee Fan did or acknowledged. If of any value at all, it was evidence of consistency in the view of the family of Yong Nyee Fan that house No. 26 was let to Kim Guan & Co. The learned judge however apparently considered Yong Su Hian as not a witness of truth and his evidence as inconsistent. But it is obvious that Kim Guan & Co. stood to succeed or fall by their own evidence and by such evidence by way of admissions or otherwise from the other side that they could get and they could not succeed merely on the defect of Yong Su Hian as a witness or on his default and that of his other witnesses.

Reading the judgment of the learned judge as a whole, we see that he really could not and did not find any evidence pointing to Yong Nyee Fan constituting himself the trustee of house No. 26 for Kim Guan & Co. He dealt with the case on this basis and perhaps it is just as well if we do so, too. It relieves us of the necessity to consider the implications of the registration of the title in the name of Yong & Co. and the indefeasibility of title that is the key-stone of the Torrens system of registration. We too can find no such evidence on the record. We have already indicated that we do not, with respect, consider the approach adopted by the learned judge and his acceptance of the faith alleged to have been placed by Yap and Tan in Yong Nyee Fan sound. In the absence of evidence, the alleged trust could not be said to have been proved, even on a balance of probabilities. The appeal must be allowed with costs here and in the court below. The claim of Kim Guan & Co. stands dismissed.

Appeal dismissed.

Solicitors: *Kean Chye & Sivalingam; Chinn Swee Onn & Co.*

KEPONG WOOD PRODUCTS CO. SDN. BHD. v. DAISHOWA (M) WOOD PRODUCTS SDN. BHD.

[O.C.J. (Abdul Hamid J.) June 22, 1977]

[Kuala Lumpur — Civil Suit No. 1633 of 1975]

Contract — Breach — Damages — Whether terms of agreement had been so altered, varied and waived by mutual consent and conduct of parties that defendant not liable under agreement — Partial recission — Effect of — Damages — Principles of assessment.

The plaintiff in this case claimed against the defendant damages for breach of contract to purchase wood chips. By an agreement of January 17, 1974 entered between the plaintiff and the defendant, for five years from the date of the said agreement, the defendant agreed to purchase from the plaintiff all wood chips produced by the plaintiff on terms set out in the agreement with an option to renew for a further period of five years on the same terms and conditions by giving two months' notice to the other party. The plaintiff claimed that the price of wood chips was $18 per long ton (LT) of 2,240 lbs and it was increased by mutual agreement. The plaintiff

undertook to produce not less than 24,000 LT per year. In May 1974 the defendant requested the plaintiff to increase production to 2,800 tons per month and the plaintiff agreed. The plaintiff alleged that it bought machinery and took steps to increase production capacity to 3,000 tons per month from April 1975. In March 1975 the defendant countermanded the request to increase production and requested the plaintiff to produce only 500 tons per month from April 1, 1975. The plaintiff did not accept the said request. The plaintiff alleged that instead of taking delivery of 2,800 LT per month the defendant took delivery from April 1975 of a much lesser quantity. By a letter of August 27, 1975 the defendant sought to repudiate the agreement and took no delivery as from that date. The plaintiff claimed loss of profit from April to August 1975 and estimated loss from September 1975 to December 1983. The defendant did not dispute the agreement but contended that the plaintiff had misrepresented to the defendant all material particulars relating to cost factors as well as the gain factor. It was argued that subsequent to the said agreement the parties did not adhere to the terms and thereby released each other from liability under the agreement. Although the plaintiff was to supply the defendant a minimum of 2,000 LT the plaintiff in fact supplied a fluctuating quantity per month and less than the stipulated minimum of 2,000 LT per month and at various prices per LT not $18 per LT.

The main issue of law was whether the terms of the agreement had been so altered, varied and waived by mutual consent and conduct of the parties that the defendant was no longer liable under the agreement.

Held: (1) partial rescission did not completely destroy the contractual relation between the parties. It merely modified that relationship by cutting out part of the rights and obligations involved therein with or without the substitution of new rights and obligations in their place;

(2) in the present case the parties had in so far as the price increases were concerned varied that part of the agreement and had mutually agreed to new terms. In regard to additional tonnage to be produced new terms were added without varying that part of the agreement where the defendant *inter alia* agreed to purchase wood chips not less than 24,000 tons per annum;

(3) the defendant's contention that a new contract had been substituted had no merit whatsoever. The defendant had committed a breach of the agreement and must therefore bear the damages arising from their failure to perform the agreement;

(4) in cases of breach of contract the aggrieved party was only entitled to recover such part of the loss actually resulting as was at the time of the contract reasonably foreseeable as liable to result from the breach;

(5) in order to determine whether or not the plaintiff was entitled to recover damages during the renewal period it was open to the court to consider firstly the nature and effect of the plaintiff's right to renew, and secondly, the loss of profit, if any, recoverable by the plaintiff;

(6) in the light of the agreement and in the absence of any subsequent agreement concerning the renewal as and when the variations were made to the agreement it was no longer possible for this court to conclude that it was within the contemplation of the parties that the right to renew on the same terms and conditions in the agreement must necessarily include the right to renew on terms and conditions different from those contained in the agreement;

(7) the actual loss liable to result from the breach of the agreement by the defendant as was at the time of the contract reasonably foreseeable must strictly arise from the defendant's failure to perform the agreement then subsisting between the parties and not for loss anticipated to arise during the currency of some future agreement. Therefore the plaintiff was not entitled to recover damages for anticipated loss of profit during the renewal period.

Cases referred to:-

(1) *Silkstone and Dotsworth Coal and Iron Co. Ltd.* v. *Joint Stock Coal Co. Ltd.* (1876) 35 L.T.R. 668.

(2) *Hadley* v. *Baxendale* (1854) 9 Ex. 341.

(3) *Victoria Laundry (Windsor) Ltd.* v. *Newman Industries Ltd; Coulson & Co. Ltd. (Third Parties)* [1949] K.B. 528

CIVIL SUIT.

E.J.H. Yong for the plaintiff.

Chin Yew Meng for the defendant.

Cur. Adv. Vult.

Abdul Hamid J.: The plaintiff's claim is for damages for breach of contract to purchase wood chips. The statement of claim alleges that a written agreement of January 17, 1974 (I shall hereafter call "the said agreement") was entered into between the plaintiff Kepong Wood Products Co. Sdn. Bhd. and Daishowa (M) Wood Products Sdn. Bhd. It was agreed that for five years from the date of the said agreement the defendant shall purchase from the plaintiff and the plaintiff shall sell all wood chips produced by the plaintiff on terms and conditions set out in the said agreement with an option to renew for a further period of five years on the same terms and conditions by giving two months' notice to the other party.

The plaintiff states that the price of wood chips was $18 per long ton (LT) of 2,240 lbs. and it was increased by mutual agreement as follows —

(1) From January 17, 1974 $18 up to 2,000 LT delivered in any one calendar month;

$21.50 for every LT in excess of 2,000 LT delivered in any one calendar month; and

(2) From July 1, 1974 $23 per LT up to 2,000 LT in one month.

$26.50 per LT in excess of 2,000 LT delivered in any one calendar month.

The plaintiff undertook to produce not less than 24,000 LT per year (2,000 tons per month). In May 1974 the defendant requested the plaintiff to increase production to 2,800 tons per month and the plaintiff agreed. It is stated that the plaintiff bought machinery and took steps to increase production capacity to 3,000 tons per month from April 1975. In March 1975 the defendant countermanded the request to increase production and requested the plaintiff to produce only 500 tons per month from April 1, 1975. The plaintiff did not accept such countermanding request.

It is alleged that instead of taking delivery of 2,800 LT per month the defendant took delivery from April 1, 1975 as follows —

April 673.01, May 681.24, June 875.85, July 1,334.08 and August 1,200.03 (LT).

By a letter of August 29, 1975 the defendant informed plaintiff that defendant was no longer bound by the agreement and took no delivery as from that date.

The plaintiff claims —

(a) Loss of profit April to August 1975 $214,000; and

(b) Estimated loss September 1975 to December 1983 $3,300,000.

The defendant admits the said agreement and the option to renew for a period of five years but contends that the said agreement is not binding in law.

The defendant also contends that if the said agreement was binding (which is denied) it was negotiated by the plaintiff having misrepresented to the defendant

all material particulars relating to cost factors as well as the gain factor in particular —

(a) the actual costs for the supply of wood chips paid by the plaintiff;

(b) the overall operational costs for the manufacture of wood chips; and

(c) by indicating there was only a very marginal profit to be obtained by him on the price agreed upon at all material times.

The defendant further contends that the said agreement is voidable at the instance of the defendant and the defendant is therefore not obliged to be bound by it if it is binding in law (which is denied).

As for wood chips the defendant admits the price was $18 per LT of 2,240 lbs. but denies that it was increased by mutual agreement from time to time as set out in paragraph 5 of the statement of claim.

The defendant does not deny that the plaintiff undertook to produce not less than 24,000 LT of wood chips per year (minimum of 2,000 LT per month) but alleges that the plaintiff did not comply with Clause 5 alternatively, in law there was no obligation on part of the defendant to purchase the minimum tonnage.

The defendant denies that the plaintiff was requested to increase production to 2,800 LT and/or that the plaintiff took steps to increase the production as from April 1, 1975. The defendant also denies that the request was countermanded asking the plaintiff to produce only 500 LT per month.

It is the defendant's contention that subsequent to the said agreement the plaintiff and defendant had by conduct and implication mutually abandoned or rescinded the agreement and therefore disclaims liability under the agreement absolutely.

It is also the defendant's contention that subsequent to the said agreement the parties did not adhere to the terms and thereby released each other from liability under the agreement. Although the plaintiff was to supply the defendant a minimum of 2,000 LT the plaintiff in fact supplied a fluctuating quantity per month — less than the stipulated minimum of 2,000 LT per month — at various prices per LT not $18 per LT.

The defendant says that in paragraph 9 of the statement of claim the plaintiff admits this. The defendant also says that the plaintiff is estopped from denying having regard to the various meetings and correspondence wherein the price and amount to be supplied were negotiated anew by the parties.

In the alternative the defendant says that the terms of the agreement had been so altered, varied and waived by mutual consent and conduct of the parties that defendant is no longer liable under the agreement. Also in the alternative the defendant says that if the agreement is subsisting the conduct of the plaintiff subsequent to the agreement has rendered the agreement impossible to perform and the agreement was frustrated thereby.

The defendant has stated that ever since the said agreement the plaintiff has been threatening to take action to endanger if not terminate the existence of the defendant as a viable enterprise.

The defendant has also stated that as early as March 14, 1972 the plaintiff made baseless accusations against the defendant threatening to refer the accusations to the Malaysian Government and by letter of April 8, 1975 the plaintiff made detrimental and baseless accusations of the defendant and a senior official of defendant with regard to the agreement.

By a letter of May 21, 1976 to the Daishowa Paper Manufacturing Co. Ltd. the plaintiff withdrew the attack on Taguchi.

The defendant maintains that in a letter to the Director-General Economic Planning Unit on July 30, 1975 the plaintiff made accusations against the defendant with regard to the agreement detrimental to defendant in its relationship with the Malaysian Government and in a letter of August 15, 1975 to the defendant the plaintiff threatened to report the defendant to the Malaysian Government unless the defendant acceded to the plaintiff's demand with regard to the agreement.

It is stated that by a letter of August 27, 1975 to the Daishowa Paper Manufacturing Co. Ltd. the plaintiff made baseless accusations against defendant damaging defendant's vital relationship with its major shareholder.

In consequence defendant company wrote to plaintiff on August 29, 1975 that they were no longer bound by the agreement. It is the defendant's case that by reason of such conduct the plaintiff made it impossible for the defendant to continue to carry out the terms of the said agreement without endangering its vital relationship with Daishowa Paper Manufacturing Co. Ltd. and the Malaysian Government and the existence of the defendant in Malaysia.

In the counterclaim the defendant alleges that the company lent machinery to plaintiff to be returned to defendant when required or when business comes to an end.

The defendant also alleges that the company constructed three structures for the plaintiff's business to be returned to defendant when required or on ending of the business or that the plaintiff shall purchase at cost price.

The defendant claims the return of the machinery and structures or $246,278.61 cost of purchase and construction.

It is also alleged that at the plaintiff's request the defendant lent $30,000 on August 23, 1975 by cheque free of interest. The plaintiff was to repay by deducting $3,000 per month from price of wood chips to be supplied to defendant from December 1975 for a period of ten months. The defendant claims the return of $30,000.

In reply the plaintiff alleges that in 1970 the defendant entered into an agreement with Leong Moh Sawmill for the supply of wood chips to be produced by the said company. The defendant agreed to build a chipper shed and chip silo and to install the same at the defendant's own expense on land leased by the

said company to the defendant. The chipper shed and silo were to be removed by the defendant at the expiration of the lease or any renewal thereof. Subsequent to the agreement the plaintiff company was incorporated and the plaintiff, defendant and the said company mutually agreed the land be leased to the plaintiff, the plaintiff taking over all rights and obligations of the said company under the agreement and by consent two chipping sheds, chip silos and chippers were installed by the defendant.

The plaintiff maintains that it is for the defendant to remove the machinery and structures. The plaintiff also maintains that no previous demand was made by the defendant for the return of the same.

The plaintiff admits the loan of $30,000 but contends that the sum was to be repaid by the plaintiff in the manner agreed, namely, by deducting $3,000 per month from the price of wood chips supplied from December 1975 for a period of ten months. Alternatively the plaintiff asks that the sum be set off against the damages.

So much for the pleadings. I shall now summarise briefly the facts adduced by both the plaintiff and the defendant.

Mr. Kitson Chan, a Chartered Accountant attached to Chan Chee Hong & Company produced the plaintiff's audited accounts for years 1970 to 1975 (Exhibit P2) and an extract from the 1975 audited accounts to show loss for period April 1, 1975 to August 31, 1975 in the sum of $49,713.80 — for the whole year a sum of $62,831. For the year 1974 the plaintiff made a profit of $59,463.

Cross-examination reveals that in 1973 the plaintiff made a profit of $28,239, in 1972 $24,623 and in 1970 $70,005. The plaintiff suffered loss of $9,241 in 1971.

Mr. Ong Tai Hong the managing director of the plaintiff company testified that in 1969 he was the manager of Leong Moh Sawmill. He met the managing director of the defendant company Mr. Hayama who was interested in producing wood chips from sawmill waste wood. Mr. Hayama suggested starting a wood chip factory.

In 1970 the plaintiff company was incorporated and started producing wood chips solely for the defendant. There was no written agreement governing their dealings. The arrangement was set out in the defendant's letter of March 23, 1970 (Exhibit P6) which *inter alia* provides that the wood chips would be sold at the rate of M$12 per ton. On June 30, 1970 the defendant wrote to the plaintiff agreeing to purchase the wood chips at $14 per ton as from that date until further notice. The defendant also expressed the hope that production would be increased. By letter of August 14, 1970 the defendant reduced the price to $13 per ton as from August 13, 1970.

In 1971 the plaintiff lost money. Mr. Ong stated that Mr. Hayama asked him to purchase as much wood waste as possible to see whether he could produce 3,000 tons per month. Thereupon the plaintiff entered into agreements with various sawmills (see Exhibit P1).

In the same year Mr. Ong told Mr. Hayama that he had insufficient lorries to carry wood waste from the sawmills to the factory and that costs were high to use lorries. Mr. Hayama assured Mr. Ong that he would compensate loss plus a profit margin of $1.50 per ton. The floods and heavy monsoon in that year, however, affected production and there was a loss. Mr. Ong wrote to the defendant to compensate the loss (AB9). Although another letter was sent (AB10) there was no reply. Several meetings were held in early 1972. The defendant maintained that loss in 1971 could be made good by more efficient production in later years at the same price. The plaintiff asked for $16 per ton and for a written agreement as he had committed himself to various sawmillers for the supply of wood waste. The defendant refused and threatened to close down the factory if the plaintiff did not co-operate.

Mr. Ong explained that he was shocked because there were no other buyers and to continue would mean risk of losses and because of this he wrote to Tun Tan Siew Sin for assistance.

Another meeting with Mr. Hayama, Mr. Ishiyama and Mr. Otaki was held subsequently and he was told that they could not decide as all decisions were made in Tokyo. As a result Mr. Ong wrote the letter of March 14, 1972 (AB15) which set out briefly what transpired at the meeting.

In April 1972 the defendant's new managing director Mr. Ishiyama agreed to pay $14 per ton and Mr. Ong wrote to confirm (Exhibit P10).

In late 1973 the new managing director Mr. Otaki wanted the plaintiff to increase production and for that he was prepared to increase the price to $18 per ton and also to sign an agreement. Hence in January 1974 an agreement was signed.

Subsequent to the signing of the agreement in a letter of January 17, 1974 (AB28) Mr. Otaki confirmed that in consideration of the plaintiff agreeing not to sell wood chips produced to anyone apart from defendant in Malaysia, the defendant agreed up to a maximum of 2,000 tons delivered in a month to pay $18 per LT *and* for every LT in excess of 2,000 delivered in a month, an incentive rate of $21.50 per LT and *further* the rates are subject to increases as provided in Clause 3 of the agreement, namely —

"the price shall be increased proportionately from time to time in the event of any increase or increases in the cost of fuel, raw materials or labour totalling 20% in any period of 12 months."

Some time in 1974 the defendant wanted the plaintiff to make provision for maximum production in the existing factory and to look for a suitable site for a new factory. The defendant agreed to give another increase of $5 per ton making it $23 per ton. The plaintiff agreed to the proposal and Mr. Ong told the defendant that by April 1975 he should be able to produce a minimum of 2,800 tons per month.

The defendant even requested the plaintiff to get an office in Kuala Lumpur and to buy more lorries to transport wood waste and a "payloader" an expensive vehicle, for internal transport at the factory. The

plaintiff did buy a payloader and three more lorries and set up an office in Kuala Lumpur and even bought a car for the office manager. The plaintiff was also told to secure agreements with two big sawmills in Cheras and Petaling Jaya for waste wood.

Consequently the defendant increased the price to $23 for the first 2,000 tons and for every ton exceeding, the rate was $26.50.

The price of $23 was confirmed by the defendant in the letter of June 15, 1974 (AB40). The plaintiff confirmed on June 21, 1974 (AB44). Mr. Ong stated that for three months, July 1974, September 1974 and January 1975 delivery exceeded 2,000 tons and the defendant paid an incentive of $3.50 per ton exceeding 2,000 tons.

Some time after July 1974 the defendant company's new managing director Mr. Sasaki met Mr. Ong and told him to cut down production for a temporary period of three months because his principal in Japan forecast a bad market situation and this was for October, November and December 1974. Mr. Ong said that he disapproved but for the sake of goodwill he was willing to co-operate and for this the defendant would give a temporary increase of $2 per ton and for the months of October, November and December 1974 the plaintiff was paid at the rate of $25 per ton. The defendant confirmed by letter of October 10, 1974 (AB46).

From January 1975 onwards the plaintiff assumed that it could carry on normal production. The defendant's lorries were not, however, regular in taking delivery of wood chips and the plaintiff complained by letter of March 13, 1975 as follows —

"Your transport arrangement has been unsatisfactory recently. At your request, we anticipate to produce not less than 2,800 tons per month from April 1975. However, your transport arrangements have caused a lot of idle production hours because of uncarted full silos."

At a meeting with Mr. Sasaki and Mr. Taguchi the defendant's finance executive Mr. Sasaki requested the plaintiff to reduce production by 80% per month. Mr. Ong said he was shocked because at that tonnage he would certainly go bankrupt. Mr. Taguchi interposed saying this was a demand, not a request. Mr. Ong left the meeting.

The defendant wrote a letter to the plaintiff to produce only 500 tons per month with effect from April 1, 1975 until market condition recovers. The defendant would send only one lorry to transport wood chips. Mr. Ong wrote back stating that all arrangements had been made to increase production to 2,800 tons and the countermand would cause the plaintiff severe losses and was in breach of the agreement. Mr. Ong also stated that he disagreed with the proposed action and would also hold the defendant responsible for all losses and damages he suffered and would suffer. Mr. Ong emphasized that under the agreement the plaintiff was not permitted to sell to anyone else in Malaysia and if the defendant did not take delivery losses would be great.

The plaintiff followed up by a letter sent to Mr. Saito in Japan (AB55). Some time in May Mr. Ong went to Japan to see Daishowa executives to reason with them. On his return Mr. Sasaki saw Mr. Ong and said that the defendant would take delivery of 1,500 tons per month. He also handed a cheque for $30,000 to help solve plaintiff's creditors' problem. Mr. Ong stated that even after that day the defendant did not take delivery of 1,500 tons per month.

Mr. Ong testified that his waste wood stockpile was getting impossible. It occupied at least ten acres of land belonging to Leong Moh Sawmill and for this Leong Moh complained (see Exhibit P11).

Mr. Ong also testified that he was really desperate because his workers were idling and there was this stockpile problem and the defendant was not taking delivery.

The plaintiff wrote a letter (AB58). The plaintiff subsequently wrote a letter to Tan Sri Thong Yaw Hong the then Director-General Economic Planning Unit telling him of his problem to enable Tan Sri Thong to ask the Japanese Embassy to reason with the defendant. It was after the plaintiff wrote this letter that the defendant wrote telling the plaintiff the agreement was cancelled.

Mr. Ong was cross-examined at length. The first part of the cross-examination was directed to the question of costs of production.

With reference to AB19 Mr. Ong agreed that this was the basis of the agreement between the plaintiff and the defendant.

Mr. Ong reiterated that the price increase of $18 was because the defendant wanted him to produce more wood chips not because of increase in costs and the $18 would cover maintenance of machinery. He denied it was the defendant who was to maintain machinery and plant. Mr. Ong added that the increase to $18 was not due solely to increase of production but because at that time the defendant was purchasing wood waste from Pahang and Negeri Sembilan at higher prices. The other reason was that he had to pay more for fuel and a little bit more to the workmen and not for raw materials.

The price increase from $18 to $23 was some time in 1974 — as an incentive to increase production in 1975 upon the plaintiff's assurance of a minimum production of 2,800 tons per month. When Mr. Ong was asked whether the reason for the increase was because he told the defendant costs of wood waste had gone up Mr. Ong denied. According to Mr. Ong the timber market was affected in 1974 and therefore there was less waste wood available.

Encik Chin Yew Meng counsel for the defendant, however, drew Mr. Ong's attention to AB36 where he had said, "The increased price of raw materials in the market forces us to seek for more realistic co-operation from you."

Mr. Ong also denied that the increase in price made by the defendant after the agreement was signed was on account of increase in cost of fuel, raw materials and labour.

With reference to P15 Mr. Ong explained that in January 1974 the tonnage was 1,110.15 because of

monsoon in November and December 1973 and also timber recession. As for November and December 1974 this was the time when defendant asked him to slow down production.

As regards AB65 Mr. Ong said that he agreed the defendant would buy 1,500 tons per month provided there was compensation based on 2,800 tons i.e. for the loss of profit on balance 1,300 tons.

When attention was drawn to AB50 Mr. Ong explained that this costing was in relation to the Kajang Project which was an extension project.

Mr. Ong was also cross-examined as to how he arrived at a figure of $3,300,000 damages.

The defendant called Mr. T. Tharumagnanam an Advocate and Solicitor to testify. He stated that in October 1975 he accompanied Mr. Taguchi to see Encik Zain Deputy Chairman of FIDA who was asked to look into the problem between the plaintiff and the defendant. Mr. Taguchi explained to Encik Zain that the whole thing arose as a result of the letter written by Mr. Ong to Tan Sri Thong Yaw Hong. Following that letter there was also a visit by one of the Ministry's officials to the factory.

Mr. Taguchi testified that the discussion he had with Mr. Ong concerned mainly the price of wood chips. He explained that the method of fixing the price of wood chips was that the company would add $1.50 to the original cost. This was because the company supplied the machinery and paid the cost for the construction of the shed. The licence to operate was obtained by the company. He maintained that the plaintiff was functioning as an employed contractor. He also maintained that the plaintiff had an agreement with the defendant that the defendant could fix the margin of profit.

Asked why the agreement was signed Mr. Taguchi said that the company received a number of letters threatening that the company's dealings with the plaintiff would be exposed publicly and also to the government.

Mr. Taguchi confirmed that AB19 was the basis of the agreement. The price was increased from $13 to $18 because the plaintiff company said they did not make profit, and, secondly, the price of wood waste was increased by $2. There was a margin of profit of $1.50 and another $1.50 for maintenance expenses.

With reference to AB28 paragraph 2(b) — the additional incentive rate of $3.50 for every LT in excess of 2,000 tons was given because the plaintiff had told the defendant that to obtain supply of raw materials for over 2,000 tons involved additional transportation costs. Apart from this the defendant company wanted steady supply of wood chips.

Mr. Taguchi stated that 2,000 tons production was an important factor and if more was produced they could make more profit. Asked whether the company took into account the costing provided by the plaintiff when the company paid for wood chips in 1972 Mr. Taguchi said that he was not here then. Nevertheless Mr. Taguchi maintained that it was because of the profit margin of $1.50 that defendant increased the price to $18.

Speaking of incentive Mr. Taguchi said that his company did not give any incentive to the plaintiff from 1971 to 1973.

With reference to AB49 and AB50 Mr. Taguchi said that the letters relate to the plaintiff's factory built by the defendant company.

Turning to the agreements plaintiff had with the sawmills (P1) and the audited accounts (P2) Mr. Taguchi said he was surprised as he felt the defendant had been misrepresented by the plaintiff because the plaintiff had been buying raw materials at $5 per ton and the defendant was made to believe that they were bought at $13 per ton. He was even more surprised to know that there was a big gap between $13 and what the defendant paid to the plaintiff.

Referring to AB44 Mr. Taguchi said that there was further increase. He also said that he was informed by plaintiff that at $18 he did not make profit. He further said the plaintiff explained to him about the costs but he does not now have clear knowledge of the details.

Asked to explain AB46 Mr. Taguchi said that the plaintiff asked for an increase of $2 because of increase in price of raw materials. The increase was temporary. He alleged that the plaintiff showed him examples of increase of raw materials.

Speaking of the renewal clause Mr. Taguchi said that the defendant would not have renewed after five years because the machinery would have depreciated in performance and the defendant company would not like to deal with a trouble-making company. He added that the life expectancy of the machinery was about ten years and if the agreement would run its normal course it would expire in 1979 and by then the machinery would be nine years old.

Mr. Taguchi maintained that in 1975 the agreement no longer existed as the conditions had changed. The plaintiff company he said had not kept the production of 2,000 tons per month (24,000 tons a year) and the agreed price could not be kept because of inflation and the price could also be varied.

In answer to question by the court Mr. Taguchi said that the defendant used the conditions as a guideline and AB77 was a confirmation that defendant did not like to have any business transaction with the plaintiff company. Under cross-examination Mr. Taguchi said that the basis of relationship with the plaintiff company was that defendant allowed a margin of $1.50 per ton profit.

Confronted with AB16(b) Mr. Taguchi, however, conceded that the defendant wrote saying that the defendant never promised nor agreed to grant the plaintiff an allowance of $1.50 per ton profit margin. Mr. Taguchi added saying that there was no need for the defendant to pay $1.50 profit margin. He further added that after the costing the defendant thought that the plaintiff company would make a profit margin of $1.50.

Mr. Taguchi did not deny that in 1972 the price had already been increased to $14. He said he was not in Kuala Lumpur then and he guessed it could have been a temporary increase. He contended that there was no relation between price increase and increased production.

Speaking of price Mr. Taguchi agreed that the plaintiff company had to file accounts but he never checked the accounts of the plaintiff company. He also agreed he never checked with sawmillers the price of wood waste although he could have done it if he wanted to.

Looking at AB50 Mr. Taguchi said that at that time the defendant was already buying wood chips at $23 per ton.

Turning to AB46 Mr. Taguchi said that the increase of $2 was accepted for three months because the price of sawmill waste wood fluctuated very often and as such the defendant gave a temporary increase. He denied it was because the defendant company wanted production decreased.

At the close of the cross-examination Mr. Taguchi said that the defendant company allowed one year period after the signing of the agreement and then decided it was not to be in existence and the defendant company made this decision unilaterally. He also said that the defendant company thought the plaintiff would not also be interested in continuing with the agreement.

Having briefly summarised the evidence adduced by the plaintiff and the defendant, it seems convenient at this point to examine some of the issues of facts. Speaking of misrepresentation the defendant contended that the plaintiff had made certain misrepresentations in negotiating the agreement of January 17, 1974 mainly in regard to the actual costs paid by the plaintiff for the supply of wood wastes. Some reliance has been placed upon AB1 the plaintiff's letter dated June 22, 1970. This was a letter written in the early stages when the parties were negotiating the setting up of a sawmill waste chipping plant and conceivably the costing was an estimate put up in order to negotiate the price for the wood chips produced. As this was done during the progress of a business transaction the defendant was clearly not obliged to accept what had been put up by the plaintiff. The defendant company could have investigated and made their own assessment of the costing if they wanted to. Besides the defendant failed to show that the costing put up by the plaintiff was not true. In any event it seems to me the price of wood chips was a matter for the parties to agree and it was not their intention that the plaintiff must satisfy the defendant the actual cost incurred on production. By the same token I form the view that this was not a case where the plaintiff had to satisfy the defendant the actual cost of production before the defendant would allow a profit margin of $1.50 per ton. This is apparent from the defendant's own letter of March 21, 1972 (AB16) where the defendant denied that the company had promised or agreed to grant the plaintiff an allowance of $1.50 per ton for profit margin.

Mr. Taguchi has said in his testimony that the plaintiff company had an agreement with the defendant that the defendant could at the defendant's discretion fix the margin of profit. This allegation is not only unsupported by any document but also inconsistent with the agreement of January 1974 and the proved facts and circumstances surrounding the transaction. Although Mr. Taguchi said under cross-examination that he was sure the company would allow margin of $1.50 per ton profit nevertheless when confronted with AB16 paragraph 2(b) he gave conflicting testimony to the effect that this was the company's policy and the company decided it and there was no need for the company to pay $1.50 profit margin.

In the light of the evidence before the court it is my finding that the price of wood chips to be paid by the defendant and the subsequent increases were essentially matters which the parties had to negotiate and to mutually agree upon. There was therefore no question of any misrepresentation on the part of the plaintiff alleged to have induced the defendant to agree to pay a certain price for wood chips. And in no way can it be held that the agreement of January 17, 1974 was negotiated by the plaintiff having misrepresented to the defendant material particulars relating to cost factors as well as gain factors.

It is not in dispute that the letter of September 17, 1973 (AB19) was the basis of the said agreement and it is evident that the price at the rate of $18 per ton was the outcome of the mutual agreement reached between the parties.

Subsequent to the agreement there were various price increases. The circumstances leading to the increases have been stated by Mr. Ong and the plaintiff's case is, I think, substantiated by various documents appearing in the Agreed Bundle. I may in passing observe that the relationship between the plaintiff and the defendant prior to the signing of the agreement had never been smooth. Such a state of affairs was contributed among other things by the absence of a proper written agreement. The tonnage to be produced and the price to be paid by the defendant were either agreed to at the meetings held from time or time or through exchange of letters or both. There was a somewhat loose arrangement between them until at the insistence of the plaintiff an agreement was concluded in January 1974. Even after the signing of the agreement the parties nevertheless continued to negotiate price increases and a few price increases were negotiated and mutually agreed upon by them. It is revealed that even on the very date the agreement was signed the defendant through his managing director Mr. Otaki wrote to the plaintiff (see AB28) that in consideration of the plaintiff having agreed not to sell wood chips produced to anyone apart from the defendant in Peninsula Malaysia, the defendant agreed up to a maximum of 2,000 tons delivered, to pay at the rate of $18 per ton and for every LT in excess of the 2,000 tons delivered in any calendar month, to pay an incentive rate of $3.50 a ton.

On the materials before the court it is overwhelmingly clear that the defendant was prepared to pay incentive rate to the plaintiff if the plaintiff could supply more than the minimum tonnage agreed to suit

presumably the defendant's purpose at the time. Mr. Taguchi explained that the incentive was given because the plaintiff had told the defendant that to obtain supply of raw materials over 2,000 tons involved additional transportation costs. Besides the defendant wanted a steady supply. This proves that the question of price the defendant would pay for wood chips was still open to negotiation even after the agreement had been concluded. For reasons that I have stated and judging also from the manner in which the whole business was transacted it is my finding that the question of misrepresentation does not seem to arise at all and it cannot certainly be said that the plaintiff had made misrepresentation to the defendant in the negotiation concerning the price of wood chips to be paid by the defendant.

I shall now direct my mind to Mr. Chin's submission that defendant acted entirely on the strength of costing provided by the plaintiff. In my view this bare assertion on the part of the defendant is completely unwarranted by the evidence. The defendant has failed to establish that it was a term of the arrangement between the parties even prior to January 1974 that, in fixing the price of wood chips, the plaintiff was obliged to state actual cost of production. Such duty was not expressly imposed upon the plaintiff and neither can I imply such a duty from the transaction carried out by the parties. As such I fail to see how there could be misrepresentations calculated to induce the defendant to enter into the agreement.

Mr. Chin also submitted that the court can infer from the increases that they were based on the representation made by the plaintiff to the defendant. I do not think the plaintiff is disputing that he made representation to secure price increases. It was indeed in the best interest of the plaintiff's company to get better price for his wood chips. The fact that the plaintiff had secured better price did not mean that this was achieved through misrepresentations as, evidently, the plaintiff had not acted in breach of any contractual obligation towards the defendant.

Now, one of the defences raised by the defendant is that the plaintiff did not comply with Clause 5 alternatively in law there was no obligation on the part of the defendant to purchase the minimum tonnage. It is not, however, denied that the plaintiff undertook to produce not less than 24,000 tons per year.

Encik E.J.H. Yong counsel for the plaintiff drew my attention to section 37(1) of the Sales of Goods Ordinance, 1957 to show that the defendant had no valid defence since the defendant never complained nor rejected that he received less than the quantity the plaintiff agreed to supply. The defendant did in fact receive and pay for the quantity supplied. Nevertheless looking at P15 it is revealed that a total of 22,200.52 tons were supplied for the year 1974 and the minimum tonnage of 24,000 per year could indeed have been supplied if the defendant had not asked the plaintiff to reduce production for the months of October, November and December 1974. As for the defendant's contention that he was not obliged to purchase the minimum tonnage the answer may be found not only in Clauses 1 and 9 of the agreement but also from the testimony of Mr. Taguchi who admitted that the defendant was obliged to accept between 2,000 and 3,000 tons per month. The two clauses in the agreement further confirm that the defendant agreed to accept all wood chips produced by the plaintiff. It must also be observed that AB19 and AB28 clearly stipulate that the plaintiff will not sell wood chips produced to anyone except the defendant.

The defendant's allegation that the plaintiff was never requested to increase production to 2,800 tons and/or that the plaintiff did not take steps to increase production as from April 1, 1975 is essentially a question of fact. I accept the plaintiff's testimony on this point and it is revealed that the plaintiff did take steps to increase production by buying more lorries to transport wood wastes and a payloader for internal transport at the factory. The plaintiff had even secured agreements with two big sawmills in Cheras and Petaling Jaya for waste wood. In consideration the defendant agreed to pay $23 per ton pursuant to letter of May 23, 1974 and the discussions that followed. This is disclosed from AB40 a letter from the defendant confirming the increase. In paragraph 2 of AB40 the defendant referred to wheel loaders to handle chipping raw materials. The plaintiff confirmed his acceptance by letter dated June 21, 1974 (AB44).

The defendant has contended that the request was countermanded asking the plaintiff to produce only 500 tons per month. In this regard I also accept Mr. Ong's testimony when he said that after July 1974 Mr. Sasaki the managing director of the defendant company told him to cut down production for a temporary period of three months — October, November and December 1974 — because his principal in Japan forecast a bad market situation. The plaintiff disapproved but for the sake of goodwill was willing to co-operate and for this the defendant was willing to give and did give a temporary increase of $2 per ton paying $25 per ton. In the circumstances I am unable to see how the defendant can deny particularly in the face of the letter written by the defendant on October 10, 1974 confirming a temporary increase of $2 for period October, November and December 1974 (AB46). When questioned by the defendant's counsel on this further increase Mr. Taguchi made a vain attempt to explain that his company was requested by the plaintiff to increase by another $2 because of increase in the price of raw materials. To my mind, the witness had told a deliberate untruth to this court in the light of the documents disclosed in the Agreed Bundle, namely, AB46, AB49, AB50, AB71 and AB75. Moreover under cross-examination he gave a somewhat different version when he said that he accepted the increase of $2 for three months because the price of sawmill waste wood fluctuated very often. The truth nevertheless prevailed when in answer to question by the court Mr. Taguchi admitted he remembered the company requesting production of 500 tons and had not thereby honoured the 2,800 tons agreed. The main reason, perhaps the only reason, the defendant terminated the agreement is disclosed from the defendant's letter of August 29, 1975 and the other defences, namely, misrepresentations as to cost factors, price increases, failure to adhere to the terms of the agreement and so forth are mere after thoughts. Furthermore the defence such as the voidability of the agreement was

indeed raised to camouflage the defendant's own wrongful breach of the agreement.

Before I turn to the question of law, I shall deal with what I think are the defendant's real grievances, namely, that the plaintiff had on various occasions submitted to the public authority for redress whereas under the agreement there is a clause for arbitration. The plaintiff he said had not conformed to the spirit of the agreement by applying for disputes to be referred to arbitration.

From the evidence of Mr. Taguchi the only reference to this ground was at the beginning of the examination-in-chief when he stated, in answer to the question as to why the agreement was signed, that his company received a number of letters threatening that the defendant's dealings with the plaintiff would be exposed publicly if the defendant did not sign the agreement. He added that the plaintiff company also threatened it would expose the defendant's dealings with the government. Mr. Taguchi expressed the view that —

"Being foreigners we were aware of consequences that would arise by having dealings with this company despite the fact that our agreement was ready and Kepong Wood Products Co. Sdn. Bhd. had even torn up the agreement — and now they are threatening us.

The agreement was only signed in 1974 because the conditions of the agreement were not suitable to my company.

In 1974 it was finally signed because we realised that we being foreigners could not have dealings with the plaintiff company without agreement."

In the first place it is clear that Mr. Taguchi was referring to the relationship that existed between the plaintiff and the defendant prior to the signing of the agreement and such being the case there was no question of any reference of any dispute to any arbitration. Even after the agreement was signed the letters sent by the plaintiff were mainly directed at the conduct and attitude of the officers of the defendant company. In any event there was no question of any intervention or pressure exerted by any authority upon the defendant to deter the defendant into submitting to the plaintiff. On the contrary the unilateral act on the part of the defendant in rescinding the agreement clearly shows that the defendant had in fact acted in retaliation to the so-called threat or accusations made by the plaintiff. In consideration I form the view that the plaintiff plainly was justified in writing the letters to express his own frustration and sheer desperation faced with the problem of reduced production as well as the slowing down of the taking delivery of wood chips. The reasons that led the plaintiff to write the letters may be gathered from the various documents produced by the plaintiff beginning with AB51. In AB52, the letter of March 1975, the plaintiff had complained that defendant's transport arrangements had caused a lot of idle production hours because of uncarted silos. And on March 17, 1975 (AB53) the defendant wrote stating as follows, I quote in full to show the actual state of relationship that prevailed then —

"(1) Due to lack of demand for wood chips from our buyer in Japan, we shall be grateful if you could kindly cooperate with us to produce 500 long tons of sawmill waste chips per month from 1st April, 1975 until the market condition recovers.

(2) As inform to you, Daishowa Transport will be stopping 2 chip lorries from the 1st of April, 1975. As the production is only 500 long tons per month one chip lorry will be enough.

(3) All Public Holiday, maintenance day (i.e. every Thursday) and every Sunday our factory Weighing Bridge will be closed with immediate effect."

Further correspondence on the matter may be seen from AB54, AB55, AB56 and AB58. The unreasonable attitude taken by the defendant company is amply illustrated by the letter written by the defendant on May 9, 1975 (AB60) which gave no alternative to the plaintiff but to abide by their direction to cut down production as temporary measure. And to cover the defendant's own failure to comply with the agreement, they wrote a letter in such a tone and in such a manner as to put the blame on the plaintiff describing the plaintiff's allegations as unrealistic and malicious. Mr. Ong replied on May 12, 1975 (AB62) disputing that he agreed to cut down production but indicated that he was willing to co-operate if the defendant would advise him how long this temporary measure would be and what compensation the defendant was willing to pay. What had transpired thereafter may be gathered from AB64, AB65, AB66, AB67, AB68, etc.

In short I find that the conduct of the defendant in dictating his demand that production be cut down and in agreeing to take delivery of only limited quantity without even providing clear indication when full delivery would be accepted was the sole cause of the breakdown in the relationship between the plaintiff and the defendant. The effect of the defendant's decision to take delivery of only a small quantity short of the minimum tonnage agreed, had, not unnaturally, shocked the plaintiff knowing that at that tonnage his company would certainly go bankrupt. Consequently he took every possible step even to the extent of paying a visit to defendant's head office in Japan in a desperate bid not only to air his grievances but also to get the defendant to abide by the agreement. It seems obvious that any sudden severance of the relationship would have the effect of putting an end to his business since the defendant company was the only company under the agreement he could sell his wood chips to. It is overwhelmingly clear from the evidence that if at all there was conduct that had rendered the agreement impossible to perform, it was that of the defendant and in no way could it be said that the contract was frustrated by the conduct of the plaintiff.

Perhaps I may as well deal with the defendant's contention that subsequent to the agreement the plaintiff and the defendant had by their conduct abandoned or rescinded the agreement. If by this allegation the defendant is referring to the subsequent increases in the prices of wood chips, I think I have made a finding of fact on this point and have held that this was not the reason the defendant terminated the agreement. If on the other hand the defendant meant the conduct of the parties in the dispute that arose in connection with the cutting down of production and the taking delivery of wood chips, I have also dealt with this aspect of the defence and have made a finding of fact. In my judgment there is no validity whatever in the contention of the defendant.

I have, I think, dealt with most of the issues of fact. The main issue of law that has been raised relates to the defendant's contention that the terms of the agreement had been so altered, varied and waived by mutual consent and conduct of the parties that the defendant is no longer liable under the agreement.

Encik Chin submitted that the established principle of law is that if the original nature and character or the features of the original agreement had been altered, then a case of substituted contract has been made out. It is the defendant's case that there were material alterations in the prices of wood chips and the tonnage to be produced.

Encik Chin also submitted that if the court holds that the subsequent variation and alterations to the agreement were entirely different from what had been envisaged then, in that event, the parties had abandoned the agreement and abided by a new agreement.

Encik Yong in reply said that there is a clear distinction between rescinding a contract and varying the terms. The only variations here are the price and volume and they cannot be said to make the contract so different from the original contract that the original contract would no longer be applicable.

To my mind, it is pertinent to determine on the materials before the court the intention of the parties. I have after careful scrutiny of the evidence come to the conclusion that at no point of time can it be said that the plaintiff had in negotiating for variation of the price and volume to be produced, expressly indicated that he would be relieved from his other obligations under the agreement. The court is also unable to gather from the correspondence exchanged between the parties, the circumstances surrounding including the plaintiff's conduct that the plaintiff had considered himself absolved from such obligations. Similarly I find no express intention nor can I imply such intention on the part of the defendant company that they regarded themselves as discharged from their obligations under the contract. The plaintiff's obligation to produce wood chips and to sell only to the defendant and the defendant's obligation to purchase from the plaintiff were never altered. So were many other terms and conditions. The terms regarding price increases and volume of wood chips to be produced were terms which the parties had mutually agreed to vary without any intention whatever on the part of either the plaintiff or the defendant that they would not be bound by the rest of the terms and conditions of the contract.

In *Pollock & Mulla's* Indian Contract and Specific Relief Acts 9th edition page 442 speaking of alteration of contract, the author has this to say —

"Parties to an agreement may vary some of its terms by a subsequent agreement. They may rescind the earlier agreement altogether either expressly or by implication the determining factor being the intention of the parties. Partial rescission does not completely destroy the contractual relation between the parties. It merely modifies that relation by cutting out part of the rights and obligations involved therein with or without the substitution of new rights and obligations in their place. Hence a contract may be varied (1) by way of partial rescission without the substitution of new terms in place of those rescinded, or (2) by way of partial rescission, with the substitution of new terms for those rescinded, or (3) by the addition of new terms without any partial rescission at all."

In the present case I am firmly of the view that the parties had in so far as the price increases varied that part of the agreement and had mutually agreed to new terms and in regard to additional tonnage to be produced new terms were added without varying that part of the agreement where the defendant *inter alia* agreed to purchase wood chips not less than 24,000 tons per annum.

In the final analysis it is my finding that the defendant's contention that a new contract had been substituted has no merit whatever. It is also my finding that the agreement of January 1974 was at all material times subsisting between the parties. It is my further finding that when the defendant company terminated the agreement by letter of August 29, 1975 informing the plaintiff that they were no longer bound by the terms of the agreement they committed a breach of the agreement and must therefore bear the damages arising from their failure to perform the agreement.

Before assessing the damages I would at this juncture consider the counterclaim. The defendant is seeking the return of the sum of $30,000. The plaintiff has not disputed that this sum was paid but is contending that it was given as advance payment for wood chips supplied and to be refunded by ten monthly instalments by deducting $3,000 from the price of wood chips supplied as from December 1975. And since the defendant ceased to take delivery of wood chips the refund could not therefore be deducted. There is merit in the plaintiff's contention and the circumstances do show that the plaintiff was only legally bound to repay the sum in the manner specified by the defendant and agreed upon by the plaintiff. Since the defendant repudiated the contract it was therefore impossible for the plaintiff to perform his obligation. In any event this sum may be set off against the damages to be awarded.

The defendant is also claiming for the return of the machinery or a sum of $246,278.61 being costs of purchase and construction. In this regard I find on the evidence produced before the court that the machinery and the structures were installed at the defendant's own expense and the defendant had agreed to remove them at the expiration of the lease held by the plaintiff. It is revealed that when the land was leased by Leong Moh Sawmill to the plaintiff it carried with it rights and obligations agreed upon between the defendant and Leong Moh Sawmill in March 1970 (see Exhibit P6). The plaintiff maintains and I do not disagree that it is for the defendant to remove the machinery and structures. Incidentally it is also apparent that no demand whatsoever was made by the defendant for the return of the same. As the plaintiff has always been willing to return them it is only proper that the defendant company should have the liberty to remove them at their own expense from the factory. Nevertheless I am of the view that the proper order of this court in the circumstances of this case is to dismiss the counterclaim with costs.

I shall now consider the question of damages. Encik Chin submitted that in the event the court holds that liability is established the court should only award damages for the balance of the period of the first term

of the agreement less any period of months to be deducted on account of contingencies. Encik Chin also submitted that in 1974 the plaintiff only made a profit of $60,000. In arriving at the final figure to be awarded the court should also consider taxation and deduction of enhanced benefit immediately obtainable. (See *McGregor* on Damages 13th edition paras. 397 to 423). Apart from this there should also be a discount for a lump sum payment on ground of contingencies.

Encik Yong contended that in the instant case damages should be assessed on loss of profit. He referred to *Halsbury's* Laws of England 3rd edition Vol. 34 page 148 para. 245 where it is stated as follows —

"Where the subject matter of the sale is goods to be manufactured or produced, or procured for the buyer, and the contract is repudiated by the buyer before such goods are manufactured, or produced, or procured, as the case may be, the measure of damages if there is no market for such goods, or it would seem, only a limited market for such goods, is the loss of the profit which the seller would have made upon the sale."

The case of *Silkstone and Dotsworth Coal and Iron Co. Ltd.* v. *Joint Stock Coal Co. Ltd.*[1] cited by Encik Yong also seems pertinent to the present case.

In that case there was a contract for sale and purchase of coal at 19s. a ton to be delivered in equal monthly quantities at pit's mouth extending over a period of nine months. During several of the months the defendants failed to send wagons to accept full quantity they were bound to accept which the plaintiffs were ready and willing to supply.

"**Held:** (by Kelly, C.B. and Cleasby, B.), that the amount of damages the plaintiffs were entitled to recover was the difference between the cost of raising the coal, added to the value of the coal itself remaining unraised in the mine (whatever those two heads of calculation may amount to) and the contract price of 19s. a ton, and that such amount could be accurately calculated and ascertained by persons familiar with the subject, without actually raising and selling the coal which, being of a perishable nature, was not readily or profitably to be so disposed of, and that the plaintiffs were not bound to have so raised and sold it."

Damages in this particular case fall under two heads —

(a) for loss of profit during the months of April to August 1975; and

(b) estimated loss of profit from September 1975 to December 1983.

In regard to (a) above the plaintiff has shown that there was an actual loss of $49,713.86 (see Exhibit P3). The defendant did not seem to dispute this. The plaintiff has also worked out the profits on the basis of 2,800 tons per month over a period of five months from April to August and has come up with a figure of $164,831.28 (see Exhibit P16). This was arrived at by multiplying 14,000 with $23 price of wood chips × 10,000 tons and $26.50 × 4,000 tons (tonnage exceeding 2,000 tons per month). This produces a figure of $336,000 and minus expenditure of $171,168.72 leaves profit at $164,831.28.

In assessing damages the court must in the present case decide whether the plaintiff was able to maintain a steady production of 2,800 tons per month. It is the plaintiff's case that it can maintain production capacity of at least 3,000 tons per month. However, there is some evidence to show that production may at times be affected by, for example, timber slump resulting in less sawmill waste wood available. The other factor which may probably affect production is the weather condition e.g. the monsoon. While the plaintiff may conceivably maintain production capacity of 2,800 tons per month, allowance must nonetheless be given for contingencies and bearing in mind the total amount produced each year during the four years preceding 1975, I am inclined to think that an estimated figure of 29,000 tons per year may fairly represent an average quantity the plaintiff is capable of producing per year which works out to about 400 tons extra per month over and above the 2,000 tons. It is upon that basis, I think, that I ought to proceed to assess the damages. With reference therefore to P16 the profit for a period of five months would have been as follows —

Sales to defendant		$283,000.00
Expenditure		$171,168.72
	Profit	$111,831.28

Thus in regard to claim (a) I would allow a total of $161,545.14 ($49,713.86 + $111,831.28).

Since loss of profit for a period of five months is assessed at $111,831.28 the loss of profit per month is therefore worked out to approximately $22,366.25, and multiplied by 40 months 18 days equals a round figure of $908,069.75. In assessing the sum to be awarded the court must take into account the enhanced benefit to be derived by the plaintiff. Using a multiplier followed by courts in running-down cases in calculating the value of an annuity allowing for interests at various rates, based on loss of $1,000 per month calculated over a period of three years, a figure of $32,640 is produced. In other words, there is a 10% deduction. Applying the formula to the present case I would therefore assess damages for the remaining period of 40 months 18 days at a round figure of $807,200.

It now remains for the court to consider the claim for damages for loss of profits during the renewal period of five years. The question poses some problem as Encik Yong himself has admitted that there is no direct authority on whether damages can be recovered. The claim is founded upon Clause 1 of the said agreement which reads

"Either party shall have the option to renew this agreement for a further period of five years on the same terms and condition as are herein contained by giving two months' notice in writing to the other party."

The cases which have been cited by Encik Yong do not seem to support the plaintiff's claim and they do not appear to be relevant for the purposes of the present case.

The principle for the recovery of damages in cases of breach of contract is stated quite clearly in the celebrated case of *Hadley* v. *Baxendale*[2] as follows —

"Where two parties have made a contract, which one of them has broken, the damages which the other party ought to

receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, i.e. according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of the breach of it."

Hadley and Baxendale's case was discussed at length in the case of *Victoria Laundry (Windsor) Ltd.* v. *Newman Industries Ltd.; Coulson & Co. Ltd. (Third Parties)*[3] and in that case Asquith L.J. at page 539 speaking of loss recoverable upon breach of contract had this to say —

"In cases of breach of contract the aggrieved party is only entitled to recover such part of the loss actually resulting as was at the time of the contract reasonably foreseeable as liable to result from the breach."

It is the plaintiff's case that he is entitled to renew the contract for another five years and that there was no doubt he would have renewed it. It is pointed out that the plaintiff had even renewed the agreements he had with sawmillers for the supply of sawmill waste wood.

The defendant is not disputing that the plaintiff was entitled to renew but what is in dispute is whether the plaintiff would be in a position to renew the contract. It is the defendant's contention that the plaintiff would not be in a position to renew the contract because the machinery installed at the plaintiff's premises would by then be too old and irreparable to function. The plaintiff will only be in a position to renew if the defendant should replace the machinery with a new set. This the defendant would not do and there is no legal obligation on the defendant's part to do so. On the pleadings before the court there is no allegation by the defendant to that effect. Nevertheless I feel that in order to determine whether or not the plaintiff is entitled to recover damages during the renewal period it is open to this court to consider firstly the nature and effect of the plaintiff's right to renew, and, secondly, the loss of profit, if any, recoverable by the plaintiff.

It may be pertinent to observe that it is still not clear to this court whether or not the plaintiff would renew the agreement. I do not think that the court can readily assume that he would. Even assuming it is reasonable to conclude that the plaintiff would want to do that as he would stand to benefit by it, I am still inclined to think that it is premature at this stage to come to any definite conclusion and any decision taken by this court would be mere speculation.

In any event looking at the relevant clause in the agreement the question that calls for consideration is whether the right contained therein was such contemplated by the parties at the time the said agreement was concluded. It must be borne in mind that the clause specifically provides that the option to renew would be on the *same terms and conditions therein contained* (the emphasis is mine). Evidence discloses that the plaintiff is not claiming that he is exercising the right on terms and conditions specified in the agreement but on terms, in particular in regard to price and quantity, subsequently varied. This did not seem to be in accord with what was contemplated by the parties. The plaintiff may of course say, "Well, in that event, I renew on the terms contained therein." This would be blowing hot and cold. I do not think it is open to the plaintiff to do that. It may well be neither the plaintiff nor the defendant had given thought to this clause when they agreed to some of the variations of the terms of the agreement. Nevertheless in the light of the clear provision of the agreement and in the absence of any subsequent agreement concerning the renewal as and when the variations were made to the agreement it is no longer possible for this court to conclude that it was within the contemplation of the parties that the right to renew on same terms and conditions in the agreement must necessarily include the right to renew on terms and conditions different from those contained in the agreement.

Apart from this the court must also consider whether the loss of profit during the renewal period can be said to be loss, to use, if I may, the words of Asquith L.J. in the case of *Victoria Laundry*, "actually resulting as was at the time of the contract reasonably foreseeable as liable to result from the breach." I hardly think so. To my mind the actual loss liable to result from the breach of the agreement by the defendant as was at the time of the contract reasonably foreseeable must strictly arise from the defendant's failure to perform the agreement then subsisting between the parties and not for loss anticipated to arise during the currency of some future agreement. After consideration it is my judgment that the plaintiff is not entitled to recover damages for anticipated loss of profit during the renewal period.

For reasons that I have stated I would enter judgment for the plaintiff in the sum of $938,745.14 ($161,545.14 + $807,200 — $30,000 (set off)) and costs. Interest at 6% to date of realisation.

Judgment for the plaintiff.
Order accordingly.

Solicitors: *Dato S.M. Yong & Co.; T. Tharu & Co.*